

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

**SUPERIOR COURT
CRIMINAL ACTION
NO. 2017-00130**

COMMONWEALTH

vs.

MICHAEL BRYANT

**FINDINGS OF FACT, RULINGS OF LAW
AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS**

The defendant, Michael Bryant seeks to suppress all evidence obtained by the Commonwealth as a result of a motor vehicle stop and arrest of his person in the town of Barnstable on or about June 10, 2017. Hearings were conducted on March 13, 2019, March 18, 2019 and March 19, 2019, at which time six witnesses appeared and testified: Detective Mark Butler, Detective Peter Ginnetty, Animal Control Officer Cynthia Sherman, Detective Thomas Chevalier, Officer Joseph Green and Detective Michael Wells. Additionally, twenty-two exhibits were admitted into evidence. Based on the credible evidence admitted and the reasonable inferences drawn therefrom, this court makes the following findings of fact.

FINDINGS OF FACT

I. The Motor Vehicle Stop and Arrest

On June 10, 2017, at approximately 1:00 p.m., Barnstable detectives and police officers staged near the defendant's residence at 122 Cedar Street, West Barnstable ("122 Cedar Street"), awaiting the defendant's presumptive return to the residence by motor vehicle. Although the Barnstable Police were in the midst of an investigation of the defendant in connection with local narcotics trafficking, that day they planned to arrest the defendant on an active arrest warrant which had been issued a week earlier on charges of assault and battery, aggravated assault and

battery, and assault and battery by means of a dangerous weapon. The charges arose from the allegation that the defendant seriously injured Peter Lindholm, a purported drug associate, because Lindholm owed him a large sum of money.

Upon observing the defendant turn onto Cedar Street driving a Range Rover sport utility vehicle, Detective Sergeant Mark Butler instructed uniformed Police Officer Joseph Green to stop the defendant's vehicle.¹ Officer Green activated his siren and blue lights in a marked police cruiser and attempted to make a motor vehicle stop. The time was somewhere between 1:00 p.m. and 1:30 p.m. However, the defendant did not pull over—instead, he proceeded to the driveway of his residence, followed by nearby officers and detectives. While entering his driveway, the defendant jerked his Range Rover to the left and sideswiped the undercover police vehicle that was being operated by Detective Peter Ginnetty, pinning it between the Range Rover and the wall of the defendant's residence.² Detective Butler, together with Detectives Michael Wells and Scott Lundegren, converged on the vehicle.³ The defendant was forcibly removed from the passenger side of the Range Rover by Officer Green and Detectives Lundegren and Wells, who handcuffed the defendant and placed him under arrest. At that time, Detective Butler looked into the defendant's Range Rover from the front passenger side and did not see anyone else in the vehicle, initially determining there were no threats to officer safety.

¹ Detective Butler has been assigned as a street-level narcotics investigation officer since early 2012. Detective Butler, a graduate of the Police Academy, is also a DEA Task Force officer and has been involved in the prosecution of over 100 cases involving street-level drugs, including cocaine, heroin, and fentanyl. Detective Butler, together with other Barnstable Police detectives and officers, was involved as the lead detective in a cocaine and Oxycodone distribution investigation of the defendant, Michael Bryant, which commenced in February 2017.

² Detective Ginnetty has worked at the Barnstable Police Department for approximately last twelve years and for the last five years has been assigned to the narcotics investigation division. Detective Ginnetty has been involved in the prosecution of over 50 narcotics investigations and has taken courses in writing search warrants and managing confidential informants. During the course of investigating the defendant, he served primarily to coordinate surveillance responsibilities. Detectives Ginnetty and Butler were assisted in their on-going drug investigation of the defendant by Detective Thomas Chevalier, working undercover in narcotics investigations.

³ Because the doors to Detective Ginnetty's vehicle were jammed closed, he exited his vehicle via the vehicle's sunroof and took up a position on the driver's side of the defendant's vehicle, blocking the defendant from exiting the Range Rover.

Detective Ginnetty informed the defendant that the police had a warrant for his arrest and gave the defendant his “Miranda warnings.” The defendant remained silent, and officers proceeded to patfrisk his person. Detective Ginnetty felt a large bulge inside the zipper front pocket of the defendant’s jacket, which he described as nearly “baseball size[d],” with a “bumpy,” not smooth, surface texture. It was immediately apparent to Detective Ginnetty, based on his training and experience, that the object was a knotted bag of contraband pill-type narcotics. Detective Ginnetty retrieved the item from the defendant’s zippered pocket and confirmed that it was a plastic bag containing a large number of pills.⁴

II. Police Access the Defendant’s Vehicle

Shortly after defendant was removed from his Range Rover, Detective Wells looked through the open right front passenger door and saw movement, apparently a white dog, in the back seat. Detective Wells then stated to Detective Butler and other officers present that there was a dog in the back seat of the Range Rover. The court credits Detective Butler’s testimony that the weather at the time was sunny, hot and humid, and there had been no indication that any other residents of 122 Cedar Street were present on scene.⁵

Detective Butler opened the rear passenger side door. On the rear passenger seat, Detective Butler observed a small white dog, and thereafter noticed an object in the rear passenger seat floor area. The object was on top of a black floor mat, sticking out from beneath the passenger side front seat. The object appeared to be a white powdery substance wrapped in

⁴ Two photos were entered into evidence, Exhibit 9 and Exhibit 10, showing Detective Ginnetty’s left hand holding a bag of pills coming from inside the defendant’s zippered jacket pocket.

⁵ Detective Butler’s testimony regarding the weather at the time was corroborated by that of Barnstable Police Dog Officer Sherman, who also recalled that the weather was warm and sunny, with the outdoor temperature approaching 80 degrees that afternoon.

clear plastic cling-wrap, consistent with bulk packaging of cocaine.⁶ After discovering the object, Detective Butler remarked: “that’s going to be our cocaine.” Detective Butler also observed two cellular telephones (“cell phones”) in the center console area. At that moment, one of the cell phones lit up to display the name “Chip,” which Detective Butler recognized as being the name of a person alleged to purchase narcotics from the defendant.

III. Police Seize the Defendant’s Vehicle and Contents

From the scene at 122 Cedar Street, Detective Ginnetty contacted the police station to request that dispatch summon the Barnstable Police Dog Officer, Cynthia Sherman, to take custody of the dog for its safety. Upon hearing from dispatch that Officer Sherman was on another call, Detective Ginnetty directed Officer Sherman to report to the Barnstable Police Station to take custody of the dog when she finished her prior call.

Detective Butler instructed Detective Ginnetty to seize and enter the Range Rover, driving it to the police station with all its contents, including the dog and the suspected cocaine package, still inside. After a short drive to the police station, Detective Ginnetty immediately removed the dog from the vehicle upon arrival and brought it inside to the dispatch, where he gave it to Officer St. Peter. Officers then performed an inventory search of the Range Rover to secure any personal property, which was placed in a bag after it was determined to have no further evidentiary value.⁷ The suspected cocaine package and the two cell phones in the car’s console were seized by police at that time.

⁶ Two photographs admitted into evidence, Exhibits 11 and 12, indicating the white dog sitting on the rear passenger seat and the rear passenger seat floor area observed by Detective Butler, including a close-up photo of the package wrapped in plastic cling-wrap sticking out from beneath the rear passenger seat.

⁷ Detective Butler filled out paperwork relative to the seizure of the defendant’s Range Rover, a so-called Notification of Seized Property Form. A copy of this form was provided to the District Attorney’s Office for civil forfeiture purposes.

Officer Sherman arrived at the station at approximately 2:00 p.m., and immediately took custody of the dog from the dispatch officer. She then brought the dog to a local shelter, the Animal Inn, for safekeeping.

The defendant challenges the warrantless seizure of the bag of pills found inside his jacket pocket, the suspected cocaine package found in the vehicle, the two cell phones found in the vehicle, and the vehicle itself. In doing so, the defendant argues that the police lacked probable cause to search him or his vehicle on the basis of an arrest for narcotics offenses. As such, the court sets forth the facts of the narcotics investigation that was on-going at the time of the defendant's arrest on the assault and battery warrant.

IV. The Preceding Narcotics Investigation

Starting in February, 2017, Barnstable Police began to investigate the defendant's involvement in local narcotics trafficking. Barnstable detectives used intelligence information from two sources, CS-1 and CS-2, during the course of their investigation. Detective Ginnetty had known and worked with CS-1 and CS-2 for a number of years and found them to provide reliable information that had been independently corroborated by police surveillance. CS-1, a male, indicated that he has known the defendant for over twelve years and that the defendant originally was from Brooklyn, New York. CS-1 indicated that the defendant had a residence at 122 Cedar Street, and that the defendant would regularly travel to New York to pick up cocaine and Oxycodone returning shortly thereafter to Cape Cod to distribute cocaine and Oxycodone. CS-1 indicated that the defendant used a separate address, 24 Grant Road, West Yarmouth ("24 Grant Road") to repackage cocaine and Oxycodone pills, which Detective Butler referred to as the defendant's "stash house." CS-1 indicated that Peter Lindholm owned 24 Grant Road, West Yarmouth and was a known associate of the defendant. CS-1 said that Lindholm was supplied

cocaine by the defendant, together with another long-time associate of the defendant, John Chapman.

CS-1 further indicated that Chapman owed the defendant money related to prior cocaine purchases, and, at some point, transferred assets to the defendant in payment of the debt. These assets included Chapman's Range Rover motor vehicle and Chapman's residence at 122 Cedar Street. Detective Butler performed a public records search and discovered that the property located at 122 Cedar Street appeared in both Chapman's and the defendant's names. CS-1 also indicated Gunnar Cahoon, who lived at 5 Rosetta Street, West Yarmouth, was a drug customer of the defendant.

The detectives also utilized an additional informant, CS-2, a female, who gave information similar to that supplied by CS-1. CS-2 indicated that the defendant had an Oxycodone distribution list and that he traveled to Brooklyn, New York at least once per week to pick up cocaine and Oxycodone to deliver and sell to individuals on Cape Cod. CS-2 indicated that whenever the defendant went to New York, he would pick up hundreds of pills and a half-kilogram of cocaine. CS-2 indicated that she had purchased Oxycodone from the defendant in amounts varying from thirty to fifty pills. CS-2 said the defendant would drive his Range Rover or a rental vehicle or sometimes take the bus to Brooklyn, New York, and later arrive back on Cape Cod with drugs on his person or in his vehicle. CS-2 indicated that she knew both Lindholm and Cahoon, and was familiar with their home addresses as she had been there in the past.

During the week of February 26, 2017, CS-2 told Detective Butler that she drove the defendant from the bus station in Bourne to 24 Grant Road, and after entering into the residence, assisted the defendant in removing a kilogram of cocaine that was "attached" to his body with

plastic cling-wrap. On March 9, 2017, CS-2 met Detective Butler at the Barnstable Police Station, with Detective Ginnetty present, and reported that she had recently been with the defendant at basement of 24 Grant Road after he returned from making drug purchases in New York. CS-2 stated that the defendant used the basement of 24 Grant Road to repackage larger quantities of drugs into smaller amounts for sale.

On March 17, 2017, CS-2 told Detective Butler that the defendant was going to New York to pick up Oxycodone and cocaine and that later that day, he would be on his way back to Cape Cod. Based on this information, Barnstable Police detectives and other police officers set up surveillance and observed the defendant exit Route 6, eastbound at exit 5, then travelling to his residence at 122 Cedar Street.

A. Controlled Purchases by CS-1 and CS-2

Both CS-1 and CS-2 agreed to make multiple controlled purchases of cocaine and Oxycodone from the defendant during the month of March, 2017.

1. CS-1's Controlled Purchases

CS-1 made two controlled purchases of narcotics from the defendant under the supervision of Barnstable Police. Detective Butler credibly testified that he and other Barnstable Police officers followed the "Controlled Purchases" search procedures outlined in section 8.2 of the Barnstable Police Department Policy and Procedure 616 relating to the use of Confidential Informants by searching CS-1, on each occasion, before and after he made controlled purchases from the defendant. (Ex. 13).

On March 21, 2017, Detective Butler met with CS-1 and provided CS-1 with "recorded funds" to make a cocaine drug purchase.⁸ Detective Butler, with Detective Ginnetty and Deputy

⁸ Detective Butler explained that recorded funds was US currency that the police provided to the informant for the controlled buy after they recorded the serial numbers of the currency.

Chief Balcom assisting in surveillance, followed CS-1 to 122 Cedar Street and observed CS-1 approach the residence. From Detective Butler's vantage point, he was unable to observe CS-1 enter or leave the defendant's residence, but after a short time, CS-1 returned with cocaine which he stated he purchased from the defendant.

On May 22, 2017, CS-1 again met Detective Butler, received recorded funds and thereafter made a controlled purchase from the defendant at his residence at 122 Cedar Street. The testimony presented to this court did not indicate the details of surveillance performed during this controlled purchase, including whether or not detectives could view CS-1 entering the residence.

2. CS-2's Controlled Purchases

CS-2 made three purchases of Oxycodone from the defendant while under surveillance by Barnstable Police. However, Detective Butler credibly testified that he was unable to strictly follow the "Controlled Purchases" search procedures outlined in section 8.2 of the Barnstable Police Department Policy and Procedure 616, (Ex. 13), relating to the use of Confidential Informants, due to three special circumstances. First, the initial controlled purchase was conducted without the use of recorded funds, because CS-2 explained to Detectives Butler and Ginnetty that her usual arrangement with the defendant was that he would "front drugs" by providing her with the Oxycodone pills, which she would then sell on his behalf for approximately \$40 each, and later make periodic payments to the defendant to pay him back following the drug sales to various Oxycodone customers.⁹ Second, the searches of CS-2 on the

⁹ CS-2's claim regarding her usual method of purchasing from the defendant was later independently corroborated by Detective Butler. On April 4, 2017, Detective Butler was meeting with CS-2 and overheard a speakerphone conversation between CS-2 and the defendant. Detective Butler described the conversation as a heated argument between CS-2 and the defendant regarding outstanding monies owed stemming from the sale of Oxycodone pills. Detective Butler noted that this telephone conversation referred to the delivery of Oxycodone to customers where CS-2 was allowed to receive Oxycodone pills in advance from the defendant, sell them, and then make payments to him later.

dates she made controlled purchases were limited to searches of her pockets, purse, and her vehicle due to the unavailability of a female police officer. Third, the various dates CS-2 was involved in a controlled purchase of Oxycodone pills, she had a cast on her arm, which Detective Butler was unable to search. Thus, the three controlled purchases by CS-2 were conducted with those modifications to typical procedure.

CS-2's first controlled purchase occurred on March 23, 2017. Detective Butler and Detective Ginnetty met with CS-2 at a prearranged location, and then separately followed CS-2 to the defendant's residence at 122 Cedar Street.¹⁰ Shortly thereafter, CS-2 returned to the detectives with forty-one Oxycodone pills that she stated she received from the defendant.

On March 27, 2017, Detective Butler again arranged to meet with CS-2, this time giving her approximately \$1600 in recorded funds to present to the defendant as repayment for the forty-one Oxycodone pills the defendant gave her on March 23, 2017. Detective Butler also took measures to record live audio of CS-2 during this transaction for safety and evidentiary purposes.¹¹ CS-2 went to the defendant's residence at 122 Cedar Street to pay for the previously supplied pills. When CS-2 returned to the detectives, she stated that after she provided the recorded funds to the defendant as repayment, he gave her an additional eleven Oxycodone pills. These eleven pills were subsequently "field-tested" by Detective Butler; the pills tested presumptively positive for Oxycodone. Detective Butler used a Barnstable Police Department form to record the use of recorded funds during a controlled purchase of drugs and made a notation on the form by writing "Oxy."

¹⁰ Testimony before this court did not indicate whether the detectives could view CS-2 entering the residence.

¹¹ The court did not receive any testimony regarding the details of visual surveillance, if any, conducted during this controlled purchase.

On March 31, 2017, Detective Butler, assisted by DEA Agent Ropaszky, met with CS-2 and provided her with approximately \$600 in recorded funds to pay the defendant for the Oxycodone pills he previously supplied her on March 27. CS-2 was again subject to live audio recording during this controlled purchase for safety and evidentiary purposes.¹² CS-2 traveled to the defendant's residence and later returned to meet with Detective Butler. CS-2 stated that she had made a full repayment to the defendant, and returned a small portion of unused recorded funds to Detective Butler.

B. Continuing Police Surveillance and GPS Tracking

Barnstable Police detectives sought and obtained so-called GPS warrants to permit GPS tracking devices to be installed on the vehicles the defendant was observed driving: the Range Rover and a Toyota 4Runner.¹³ These warrants were issued between the time period March 29, 2017 and May 23, 2017 (Exs. 1-5). The last GPS warrant for the defendant's Range Rover expired on June 6, 2017. Utilizing GPS data retrieved from the defendant's Range Rover, for the period March 29, 2017 to May 19, 2017, it was determined that the defendant made numerous multi-day trips to New York from 122 Cedar Street, returning to residence at 24 Grant Road where he stayed for a prolonged period.¹⁴

¹² As with the March 27 controlled purchase, the court did not receive any testimony regarding the details of visual surveillance, if any, conducted during the March 31 controlled purchase.

¹³ On March 31, 2017, CS-2 provided additional information regarding the defendant's use of a rented motor vehicle, a Toyota 4Runner registered in Rhode Island. CS-2 indicated that the defendant was using this rental vehicle to travel back and forth to New York to pick up drugs. Detectives conducted surveillance of the defendant on March 31, 2017 and observed the defendant return the Toyota 4Runner to a Hertz rental facility and then later pick up his Range Rover at a collision shop.

¹⁴ GPS tracking showed the defendant's Range Rover traveling from Cape Cod to New York City on April 13, returning on April 17 to 122 Cedar Street briefly and then to 24 Grant Road, where he stayed for approximately 1.5 hours. On April 22, the defendant again traveled from Cape Cod to New York City, returning on April 25 to conduct a brief meeting with the occupants of black Mercedes on Willow Street in Yarmouth before heading to Cape Cod Community College, where the defendant was taking classes. After the defendant left the college, he traveled to 24 Grant Road where he remained for two and one-half hours. On April 30, the defendant made another such trip, returning directly to 24 Grant Road on May 2 at approximately 4:20 p.m. Upon the defendant's arrival, he met up with Malik Koval, who is known to detectives as a "street level" narcotics distributor. Koval accompanied

In addition to the GPS tracking of the defendant's vehicles, Barnstable police installed a surveillance camera on a pole outside 24 Grant Road. The pole camera was installed in March, 2017, and maintained throughout the three-month investigation. The surveillance video shows that approximately three to four times per week during that period, the defendant walked towards the left side of 24 Grant Road, headed in the direction of the rear basement apartment, and later exited the premises from the left side towards the front of the residence.

Barnstable Police also conducted visual surveillance of the defendant throughout the months of April, May and June, guided in part by the on-going GPS tracking of his vehicles. This visual surveillance showed the defendant making numerous brief visits, often more than one visit per day, to the basement area of 24 Grant Road, which detectives believed was consistent with CS-1 and CS-2's reports that the defendant was using the basement as his "stash house." Detectives found significant the contrast between these frequent short visits and the longer visits the defendant made upon returning from New York City, behavior detectives attributed to the significant amount of time required to repackage drugs from bulk quantities to smaller packaging for distribution, as CS-1 and CS-2 had previously claimed was the defendant's usual practice.

During the defendant's brief visits to 24 Grant Road, other people would at times arrive for minutes-long interactions with the defendant at or near the basement area, behavior detectives found to be consistent with drug transactions.¹⁵ The defendant would also briefly visit 24 Grant

the defendant inside 24 Grant Road, emerging approximately twenty-five minutes later with the defendant, who handed Koval an object while the men stood in the driveway before parting company. The court received brief testimony that GPS tracking showed the defendant's vehicles making additional trips to New York City on May 9, 15, and 19, where after the defendant returned directly to 24 Grant Road. No further detail on these trips was provided.

¹⁵ On April 4, 2017, after the defendant had been observed entering the basement apartment, a female entered the basement area and emerged approximately three minutes later. Likewise, on April 6, 2017, the defendant was observed at 24 Grant Road interacting with Marco Silva while he operated a blue Kia automobile. Silva is known to law enforcement as a drug-dependent person. Later that day, the defendant met with Dean Tallman at 24 Grant Road. Tallman is a suspected oxycodone customer of the defendant. Further, on April 18, 2017, the defendant was observed traveling to 24 Grant Road, where at first the defendant went to the front door then shortly thereafter

Road before leaving to drive to a series of residences throughout the Cape, some of which corresponded to persons previously identified by CS-1 and/or CS-2 as among the defendant's drug customers or associates.¹⁶ Detectives believed that these brief sequential residence visits were consistent with CS-2's claim that the defendant serviced a narcotics distribution "list."

proceeded to the left side heading towards the basement door. Minutes later, the defendant was observed having a brief interaction with Marco Silva directly on the street adjacent to 24 Grant Road.

¹⁶ On April 5, 2017, the defendant travelled to 24 Grant Road, leaving after a brief period of time to travel to an address on Dana's Path in West Yarmouth, where he stayed for a short period of time. The defendant then traveled to an address in Yarmouth at 59 North Main Street, then to an address at 18 Mars Lane. At the Mars Lane address, detectives observed a female resident come out and speak to the defendant at the window of his Range Rover, consistent with what the detectives believed was a drug transaction. Later on April 5, 2017, the defendant was observed returning to 24 Grant Road where Detective Ginnetty reported the defendant had several guests arrive and stay at that address for approximately three hours.

On the morning of April 6, 2017, the defendant travelled to 24 Grant Road for a short period, after which he drove to 59 North Main Street, Yarmouth. Approximately seventeen minutes later, the defendant left 59 Main Street with a female and drove his Range Rover to 56 Hockamon Street, Yarmouth. Detectives were aware that this address had been previously identified by CS-2 as the residence of an Oxycodone customer of the defendant's named Kathy, who drove a Volvo automobile. Later that afternoon, the defendant again travelling to 24 Grant Road, then went to 116 Oak Street in Harwich and met with Glenroy Cranston, another suspected Oxycodone customer of the defendant.

On April 10, 2017, at approximately 12:20 p.m., detectives observed the defendant drive his Range Rover to 24 Grant Road where he entered and left quickly. The defendant was then observed travelling to an address on Race Road, Yarmouth, and subsequently to an address on Mill Pond Road, Yarmouth; CS-2 had previously advised the detectives that the residents of those addresses were the defendant's drug customers. From there, the defendant travelled to Cahoon's residence at 5 Rosetta Street, staying there for approximately two minutes, then leaving. The observations of the detectives on this day corroborated information CS-2 had previously given and according to Detective Butler, was consistent with drug transaction activity.

On April 20, 2017, at approximately 11:10 a.m., the defendant was observed travelling to 24 Grant Road and at approximately 11:40 a.m. the defendant was observed meeting with Cahoon and Eric Brando outside 24 Grant Ave. The detectives found this meeting to be significant as both Cahoon and Brando had been suspects in numerous narcotics investigations. Around noon, the defendant was observed proceeding to the Cahoon residence on Rosetta Street. A short time later, Brando, who was seen earlier entering this residence with a bag that appeared to be "light," was now observed leaving this residence with the same bag that appeared to be "heavy." The defendant was then observed driving to Castlewood Circle in Hyannis to the home of Sara Allard, a known Oxycodone customer of the defendant. Lastly, the defendant was observed driving to a residence on Earl Court, West Yarmouth where he made a quick stop at that address.

On May 17, 2017, detectives observed the defendant leave 122 Cedar Street, drive to 24 Grant Road and after a brief visit to the rear of the premises, the defendant then travelled to the Cahoon residence on Rosetta Street and remained there for approximately 15 minutes.

On May 18, 2017, at approximately 6:12 p.m., the defendant left 122 Cedar Street, drove to 24 Grant Road and after a brief visit to the rear of the premises, the defendant left and returned to 122 Cedar Street at 6:35 p.m. Shortly thereafter, the defendant drove to 59 North Main Street, where he remained for thirty minutes, and then returned to 24 Grant Road. There, the defendant met with Lindholm in front of the residence, and entered the front door with him. Approximately, thirty-five to forty minutes later, the defendant left 24 Grant Road and drove to 979 Falmouth Road, Hyannis. After a brief stay at this address, the defendant returned to 122 Cedar Street, then to a location on Old Stage Road, returning to 979 Falmouth Road again around 9:00 p.m. Approximately twenty minutes later, the defendant returned to 122 Cedar Street.

C. Events Leading Up to the Defendant's Arrest

At the end of May, 2017, Detective Butler sought the assistance of CS-1 to make a further controlled purchase from the defendant at his 122 Cedar Street residence. Detective Butler planned to seek a search warrant of the defendant's residence at 122 Cedar Street. In June, as Detective Butler was preparing to write a search warrant application and affidavit for the search of the defendant's residence, he was advised by Yarmouth Police Detective Michael Wells that an arrest warrant had issued for the defendant from the Barnstable District Court for assault and battery, aggravated assault and battery, and assault and battery by means of a dangerous weapon against Lindholm. The charges were brought on the allegation that the defendant beat up Lindholm in the basement apartment of 24 Grant Road, Lindholm's residence, because Lindholm owed him money. Lindholm allegedly suffered serious injuries requiring him to be transported to a Boston hospital for intensive medical treatment.

On Friday, June 9, 2017, detectives learned that the defendant had left Cape Cod in his Range Rover and was most likely traveling to New York. No further GPS monitoring was available because the GPS warrant on the defendant's Range Rover had expired on June 6, 2017. The detectives decided to wait until the following day, June 10, 2017, to conduct surveillance at the defendant's 122 Cedar Street residence. Additionally, Detective Butler, an authorized user of the Automated License Plate Reader from the Sagamore Bridge camera, received an "alert," which indicated that the defendant's vehicle had travelled over the Sagamore Bridge, heading back onto Cape Cod.

On June 10, 2017, at approximately 1:00 p.m., Detective Ginnetty, in an unmarked police vehicle, observed the defendant's Range Rover on Route 6 in the vicinity of Exit 4, heading eastbound, where the defendant's vehicle exited Route 6 at Exit 5 and travelled directly towards

the defendant's residence at 122 Cedar Street. Detective Ginnetty had previously obtained the defendant's license plate number and confirmed that it was the defendant's Range Rover heading in the direction of the defendant's residence. Detective Ginnetty followed the defendant in his unmarked police vehicle on Route 149 heading towards 122 Cedar Street, while Detective Butler and Officer Green conducted surveillance near the defendant's residence. Officer Green positioned himself in a church parking lot in close proximity to the defendant's residence. Additionally, Detectives Wells and Lundegren were also in the immediate vicinity in separate unmarked police vehicles. When the defendant was observed turning left onto Cedar Street, the motor vehicle stop leading to the arrest of the defendant and the seizure of the various evidence at issue in this motion ensued, as described in detail *supra*, Sections I-III.

RULINGS OF LAW

The defendant seeks the suppression of all evidence seized as a result of the June 10, 2017 motor vehicle stop and warrant arrest. This includes the plastic bag of pills retrieved from the defendant's front jacket pocket immediately after his arrest, the presumptive cocaine wrapped in plastic cling-wrap observed inside the defendant's vehicle, the two cell phones seized from the center console of the defendant's vehicle, any other evidence collected at that time, and all subsequent "fruits" of such evidence. The defendant argues that the seizure of this evidence was outside the permissible scope of a search incident to arrest, not authorized by a search warrant, and otherwise unsupported by probable cause to arrest for narcotics trafficking.

I. The Bag of Pills

It is undisputed that the defendant's June 10, 2017 custodial arrest was lawful under the Barnstable District Court arrest warrant related to the assault charges. Thus, the officers were permitted to search the defendant's person and areas within his immediate control at the time of

his arrest to eliminate the risk that the defendant could gain access to a weapon or destructible evidence. *Commonwealth v. Figueroa*, 468 Mass. 204, 215 (2014). Upon patting down the defendant to effectuate such a search, Detective Ginnetty felt a bumpy, nearly “baseball size[d],” object in the defendant’s front jacket pocket. The court credits Detective Ginnetty’s testimony that he immediately recognized the object, based on his training and experience, as a knotted bag of contraband pill-type narcotics.

Thus, Detective Ginnetty had probable cause to remove the bag from the defendant’s pocket under the “plain feel” exception, even though, as the defendant argues, he was already handcuffed and there was no reason to believe the bag was a weapon. See *Commonwealth v. Wilson*, 441 Mass. 390, 397 (2004) (plain feel doctrine comports with art. 14). Accordingly, the bag of presumptive Oxycodone pills was lawfully seized, and the defendant’s motion to suppress must be **DENIED** as to that evidence and any fruits thereof.

II. The Range Rover and its Contents

Next, the defendant seeks to suppress the evidence seized from inside the Range Rover, including the cell phones retrieved from the center console and the half-kilogram package of powder wrapped in plastic cling-wrap, which was retrieved from the rear foot well, partially underneath the front passenger seat. Where the items were seized without a warrant, the Commonwealth bears the burden of proving that the seizure was justified by one of the recognized exceptions to the warrant requirement. *Commonwealth v. Ortiz*, 376 Mass. 349, 353 (1978). Without reaching the merits of the Commonwealth’s other arguments regarding the existence of probable cause to search for evidence of narcotics distribution at the time the vehicle stop was initiated, the court finds that the Commonwealth has proven that the evidence was

seized as a result of plain view observations by police who were lawfully in a position to make such observations after the defendant was arrested pursuant to the warrant.

A. Opening the Rear Door of the Vehicle

By executing an arrest warrant for the defendant, Barnstable police unwittingly created a circumstance where defendant's dog was left unattended in the vehicle on a hot and sunny day. At the time, there was no sign that any other person was present at 122 Cedar Street to retrieve the dog on the defendant's behalf, and the defendant did not identify anyone who could have done so. If this police-created circumstance placed the dog at imminent risk of physical harm from heat exposure, it would be objectively reasonable and statutorily permitted for officers to enter the vehicle without a warrant to attend to the dog. See G. L. c. 140, § 174F (b) ("After making reasonable efforts to locate a motor vehicle's owner, . . . [a] law enforcement officer . . . may enter a motor vehicle by any reasonable means to protect the health and safety of an animal . . . for the sole purpose of assisting the animal and may not search the vehicle or seize items found in the vehicle unless otherwise permitted by law"); *Commonwealth v. Duncan*, 467 Mass. 746, 753 (2014) (emergency aid exception to both art. 14 and Fourth Amendment "permits the police in certain circumstances to enter a home without a warrant when they have an objectively reasonable basis to believe that there may be an animal inside who is injured or in imminent danger of physical harm.") (internal quotations omitted).

Thus, the questions before the court are whether Detective Butler's action in opening the vehicle's rear passenger door was reasonable to protect the health of the dog, and whether he performed an impermissible search of the vehicle once the door was open. The defendant asserts that Commonwealth has not established that the dog was actually in distress inside the vehicle, and argues that the detective's true purpose in entering the vehicle was either mere curiosity or

an intent to search for contraband. In the defendant's view, any claim of distress is contradicted by the officers' choice not to immediately remove the dog from the vehicle on-scene, but instead to leave the dog inside while the vehicle was driven to the police station.¹⁷

The court finds that the hot and sunny conditions at the time provided an objectively reasonable basis for Detective Butler to believe that the dog inside the vehicle was at present risk for imminent physical harm if left inside unattended. See G. L. c. 140, § 174F (a) ("A person shall not confine an animal in a motor vehicle in a manner that could reasonably be expected to threaten the health of the animal due to exposure to extreme heat or cold."); *Duncan*, 467 Mass. at 753. This conclusion is not undercut by the use of the seized Range Rover to transport the dog to the station for safekeeping: the court notes that for most of the period where the dog was still in the vehicle after its initial discovery, Detective Ginnetty was also inside the vehicle, and therefore able to ensure that the dog was not confined in a manner that would expose it to extreme heat. Moreover, the court notes that the dog was immediately removed from the vehicle upon arrival at the station, and taken inside the police station where it was attended by Officer St. Peter.¹⁸

In short, the court finds that under the totality of the circumstances, Detective Butler's initial entrance to the back seat of the Range Rover was lawful under the emergency aid exception to the warrant requirement, and also permitted by Section 174F (b). See *Duncan*, 467 Mass. at 755 ("The reasonableness of the search [under the emergency aid exception for animals] must be determined on a case-by-case basis upon consideration of the totality of the

¹⁷ The defendant argues that the dog was left inside the Range Rover for a further two hours after Detective Butler opened the door and saw the package of powder. This assertion is not supported by the record, and the court notes that the dog was inside the vehicle for substantially less than an hour—the time it took contact dispatch, determine Officer Sherman was unavailable, and drive the Range Rover to the police station without further search.

¹⁸ Although the court received no explicit testimony regarding the station's climate control systems, the court infers from the station's operational status at the time that it was safe human and animal habitation.

circumstances,” including “an especially strong societal interest, [as] suggested by [] legislative enactments . . . in avoiding injury to animals inflicted by humans”). Moreover, the court finds that Detective Butler’s action in opening the door was directly prompted and motivated by Detective Well’s declaration that there was a dog on the rear seat, not by a present intention to search the vehicle for contraband. Once Detective Butler lawfully opened the rear passenger door to reach the dog, the observation of contraband in plain view provided probable cause to seize and search the vehicle, and thus Detective Ginnetty reasonably decided, in the absence of an available animal control officer, to leave the dog in the vehicle while he drove it to the station to be searched.

B. Seizure of Vehicle and Its Contents

Evidence may be seized without a warrant under the plain view doctrine “(1) where the police are lawfully in a position to view the object; (2) where the police have a lawful right of access to the object; and (3) in cases concerning (a) contraband, weapons, or other items illegally possessed, where the incriminating character of the object is immediately apparent; or (b) other types of evidence (‘mere evidence’), where the particular evidence is plausibly related to criminal activity of which the police are already aware.” *Commonwealth v. Sliech-Brodeur*, 457 Mass. 300, 306-307 (2010) (citations omitted). For the plain view doctrine to apply, the evidence must be discovered inadvertently. *Commonwealth v. Tarjick*, 87 Mass. App. Ct. 374, 378 (2015).

Here, Detective Butler opened the rear door for an objectively reasonable purpose unrelated to any search directed at the defendant, and thereafter was in a position to inadvertently view the object sticking out from underneath the passenger seat. *Commonwealth v. Santana*, 420 Mass. 205, 212 (1995) (constitutionality of plain view seizure “hinges on the objective

reasonableness of the officer's actions" in light of "some legitimate reason for being present unconnected with a search directed against [an] accused.") (internal quotations omitted). Further, after reviewing the photographs of the package, including the apparent powder residue on the mat beneath the package, the court credits Detective Butler's testimony that it was immediately apparent to him that the package was contraband, likely a large quantity of powdered narcotics encased in plastic cling-wrap, indicative of bulk distribution. Based on Detective Butler's training and expertise, he "knew from the nature of the package and its place of [partial] concealment that the package contained contraband," and was, contrary to the defendant's assertion, distinguishable from an innocuous item like a submarine sandwich. See *Commonwealth v. Figueroa*, 412 Mass. 745, 751 (1992). Accordingly, the court finds that Detective Butler had probable cause to seize the package under the plain view exception to the warrant requirement.

Turning to the remaining evidence, the vehicle itself and the cell phones in its center console, the court concludes that once Detective Butler observed the package of presumptive cocaine in the vehicle's rear foot well, there was probable cause to seize the remaining items as "plausibly related to criminal activity," namely narcotics distribution. See *Tarjick*, 87 Mass. App. Ct. at 378. This probable cause was only increased by Detective Butler's plain-view observation of the name "Chip" on the light-up display of one of the cell phones, which Barnstable Police recognized as the name of a suspected drug customer of the defendant. See *Commonwealth v. Alvarez*, 480 Mass. 1017, 1018 (2018) (no search occurred where officer was in lawful position to observe ringing cell phone and read text message on outer screen, in the absence of any evidence that "officer opened the cell phone, manipulated it to view the text message, or otherwise perused its contents.")).

Accordingly, Detective Butler was not required to ignore the evidence of narcotics distribution which he encountered inside the vehicle after opening its door to reach the dog, despite the lack of a search warrant for the vehicle. The defendant's motion to suppress must therefore be **DENIED** as to the vehicle, its contents, and any fruits thereof.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the defendant's motion to suppress evidence seized on June 10, 2017 and any fruits thereof, be **DENIED**.


Robert C. Rufo
Justice of the Superior Court

Dated: May 20, 2019